United Nations / International Maritime Organization

# Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages

Distr.
GENERAL

A/CONF.162/3/Add.1
24 February 1993

Original: ENGLISH

Geneva, 19 April 1993
Item 8 of the provisional agenda

PREPARATION AND ADOPTION OF A CONVENTION ON MARITIME LIENS AND MORTGAGES

## Compilation of comments and proposals by Governments, and by intergovernmental and non-governmental organizations on the draft convention on maritime liens and mortgages

Addendum

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GE.93-50570

## I. INTRODUCTION

1. This document sets out the comments and proposals of Governments on the draft convention on maritime liens and mortgages that were received between 19 October 1992 and 15 February 1993. In that period, comments were received from the following countries: Indonesia, Republic of Korea, United States of America.

## II. COMPILATION OF COMMENTS AND PROPOSALS

### A. INDONESIA

[Original: English]

2. In principle the draft convention is acceptable, except article 3(2.b) and article 15, under which the Government of Indonesia has the following views:

Article 3(2.b): Voluntary change of ownership or registration

3. The Indonesian Government is having difficulty in implementing this article, since the new certificate for the new registration of the vessel shall be issued after the Indonesian authorities have received clarification of the deletion of the vessel's registration from the former State.

Article 15: Temporary change of flag

4. The temporary change of flag cannot be implemented, since the Indonesian system stipulates that every new registration of the vessel can only take place after the pertinent authorities in Indonesia have received clarification of its ownership.

### B. REPUBLIC OF KOREA

[Original: ENGLISH]

5. The Republic of Korea proposes the following amended texts for articles 6, 6 bis, 7 and 10:

Article 6: Other liens

> Each State Party may grant other liens to secure claims other than those referred to in article 4. Such liens shall rank after the maritime liens set out in article 4 after registered mortgages, "hypothèques" or charges which comply with the provisions of article 1.[1/]

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[1/ The proposal is to delete the bracketed wording "maritime liens or" from line 1.]

Article 6 bis: Rights of retention

1. Each State Party may grant under national law a right of retention in respect of a vessel in possession of either:

(a) a shipbuilder, to secure claims for the building of the vessel; or

(b) a ship repairer, to secure claims for repair, including reconstruction of the vessel effected during such possession.[2/]

Article 7: Characteristics of maritime liens

Subject to the provisions of article 11, the maritime liens set out in article 4 follow the vessel notwithstanding any change of ownership or of registration or of flag.[3/]

Article 10: Notice of forced sale

1. Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to:

(a) the authority in charge of the register in the State of registration;

(b) all holders of registered mortgages, "hypothèques" or charges which have not been issued to bearer; and

(c) all holders of registered mortgages, "hypothèques" or charges issued to bearer and all holders of the maritime liens set out in article 4, provided that the competent authority conducting the forced sale receives notice of their respective claims.

2. Such notice shall be provided at least 30 days prior to the forced sale and shall contain either:

(a) the time and place of the forced sale; or

(b) such particulars concerning the forced sale or the proceedings leading to the forced sale as the State conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

3. In addition to any notice by publication which may be required by the national law of the State conducting the forced sale, the notice specified in paragraph (2) of this article shall be written and may be given by receipted post or by any electronic or other appropriate means which provide confirmation of receipt.

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[2/The proposal is to delete the brackets around the words "under national law" in paragraph 1 and to delete paragraph 2.]

[3/It is proposed to delete the brackets around the words "set out in article 4".]

4. If permitted by the national law of the State conducting the proceedings, any person entitled to receive notice in accordance with this article may waive such notice.[4/]

## C. UNITED STATES OF AMERICA

[Original: English]

6. In developing this draft international convention, the IMO/UNCTAD Joint Intergovernmental Group of Experts (JIGE) has sought to develop an international convention on maritime liens and mortgages that will be more widely acceptable than the 1967 Convention and more reflective of current commercial practice than the 1926 Convention. One of the purposes underlying the current draft convention is to encourage ship financing by promoting an instrument that provides adequate security for the ship's mortgage while simultaneously encouraging the provisioning of services to ships and thereby facilitating international trade.

7. In noting the wide variations under the national law of many countries, the United States believes that the new convention must be considered from a practical perspective and must reflect existing commercial practice. Therefore, the following comments are offered in the hope of developing a convention that is more widely accepted. All proposals for amendment of the draft convention indicate suggested new text with underlines (e.g. deregistered) and suggested deletions with strikeouts (e.g. ~~deregistered~~).

Article 3

8. In the view of the United States, this article is important to the development of an effective system for protecting vessel mortgagees in cases involving voluntary changes from the registry of one State Party to that of another. The current text is an improvement upon the 1967 Convention text, but could be improved even further. The United States recommends two changes that would provide for internal consistency within the draft convention and would promote clarity in respect of a State Party's obligation not to reregister a previously registered vessel unless the previous State of registration certified that all deregistration requirements had been met.

9. The first change that is recommended is to replace the word "deregistered" in the fifth line of article 3.1 with the word "discharged". The word "discharged" more accurately describes commercial practice and eliminates the ambiguity between "deregistering" a vessel and "deregistering" a mortgage, "hypothèque" or charge. For consistency and clarity, article 15(d) should also be amended to use the word "discharge" rather than "satisfaction".

10. The second proposal is to replace article 3(2)(a) and 3(2)(b) with simpler but more direct text which clarifies the State Party's obligations but provides that State Party with more discretion on how to implement article 3

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[4/ It is proposed to delete the brackets around subparagraph 2(b) and paragraph 4.]

requirements. This streamlined approach is more consistent with the fundamental objective of the draft convention to protect vessel mortgages where there are changes in registration of a vessel between two State Parties. Additionally, article 3(2)(b) does not accurately reflect commercial practice in that "deregistration" of a vessel and "reregistration" in a different national register are never simultaneous. The following amended text is proposed:

Article 3: Voluntary change of ownership or registration

1. In the event that a voluntary change of ownership or voluntary change of registration entails the deregistration of the vessel from the national register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all mortgages, "hypothèques" or charges are previously ~~deregistered~~ discharged or the written consent of all holders of such mortgages, "hypothèques" or charges is obtained.

2. Without prejudice to article 11.3 [11.4][5/], a vessel which is or has been registered in a State Party shall not be eligible for registration in another State Party unless the former State Party certifies that the deregistration requirements of this article have been complied with ~~either~~:

~~(a) a certificate has been issued by the former State to the effect that the vessel has been deregistered; or~~

~~(b)~~ ~~a certificate has been issued by the former State to the effect that the vessel will be deregistered with immediate effect, at such time as the new registration is effected. The date of registration shall be the date of deregistration~~ of the vessel by the former State.

Article 4

11. The United States believes that the Conference should amend article 4 to reintroduce general average claims (to be ranked with salvage as was done in the 1967 Convention) and to eliminate the restriction on tort claims to those "other than loss of or damage to cargo, containers and passengers' effects carried on the vessel".

12. Retention of maritime lien status for general average claims is more consistent with established international law and practice. Affording cargo, container and passenger interests the opportunity to avail themselves of the maritime lien remedy where vessel owners have been responsible for damage is equitable, desirable, and is an important aspect of developing a draft convention that is widely accepted. The following amendments are proposed:

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[5/] Reference to article 11.4 as opposed to article 11.3 merely reflects the consequential amendment that would be necessary if the Conference agrees to adopt the recommendation of the Chairman of the JIGE. See JIGE(VI)/8, annex, page 5, No 1.

Article 4: Maritime liens

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including the costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for salvage and general average;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel ~~other than loss of or damage to cargo, containers and passengers' effects carried on this vessel~~.

Article 6

13. The new convention on maritime liens and mortgages should afford ample protection for all maritime claimants who extend credit in respect of a vessel. The United States believes that ship suppliers provide an important service by frequently extending credit to facilitate vessel operations.

14. Providing for these maritime liens would be consistent with the goals of the draft convention to provide an effective basis for the worldwide enforcement of legitimate claims without jeopardizing the security interests of article 4 maritime lien holders or vessel mortgagees whose claims would receive priority. Without the greater assurance of payment provided by the option of maritime lien enforcement, worldwide vessel operations will become more difficult if suppliers are no longer willing to extend credit to vessel owners and operators.

15. The United States agrees with the general approach adopted in the current draft convention to allow a State Party to provide a maritime lien under its national law. However, the important services provided by suppliers should be recognized more explicitly. Accordingly, the United States proposes the following substitute text for existing article 6:

Article 6: Other maritime liens

1. Claims for the supply of goods, materials, provisions, equipment including containers, appurtenances or services in furtherance of the operation, navigation, repair or maintenance of the vessel shall be secured by a maritime lien. Such maritime liens shall rank after the maritime liens set out in article 4 and the mortgages, hypothèques and other charges which comply with the requirements of article 1, and shall rank inter se in the inverse order of the time when the claim secured thereby accrued.

2. Each State Party may grant additional maritime or other liens to secure claims other than those referred to in article 4 and paragraph 1 of this article. Such liens shall rank after the maritime liens set out in article 4, the register mortgages, 'hypothèques', or charges which comply with the provisions of article 1 and the liens set out in paragraph 1 of this article.

Article 6 bis

16. During the preparatory work by the Joint Intergovernmental Group of Experts (JIGE), the United States raised concerns regarding both the intent and the effect of the proposed article 6 bis. (See LEG/MLM/23 of 21 June 1989, Submission by the United States). As currently drafted, acceptance of this text could lead to considerable confusion in practice. For example, the meaning of article 6 bis.2 is unclear and ambiguous where it states that rights of retention "shall not prejudice the enforcement of the maritime liens set out in article 4, but may be exercisable against the vessel, notwithstanding the existence of any registered mortgages, 'hypothèques' or charges". This provision raises questions regarding how it would be enforced and whether it implies that article 4 liens enjoy a unique priority, whereas mortgages and similar charges do not. Clarification of this provision will eliminate any ambiguity that might undermine the security interests of vessel mortgagees.

17. Another substantial concern raised by the current draft of article 6 bis is that of priority. There is no provision in this article or elsewhere in the convention that addresses the question of how rights of retention fit into the priority scheme for the distribution of proceeds in the event of a forced sale. Although the proposed new paragraph 3 to article 11 may provide some clarification (see LEG/MLM/27 of 17 November 1989, page 5 of Annex, footnote 1), the United States believes that clarification regarding article 6 bis rights of retention and both article 4 maritime liens and article 1 mortgages, "hypothèques" or charges, should be provided in article 6 bis itself. However, because of the wide variance among nations in respect of rights of retention, article 6 maritime liens is a matter best left to national law. Accordingly, the United States proposes the following amendments to article 6 bis:

Article 6 bis: Rights of retention

1. Each State Party may grant under national law a right of retention in respect of a vessel in possession of either:

(a) a shipbuilder, to secure claims for the building of the vessel; or

(b) a shiprepairer, to secure claims for repair, including reconstruction of the vessel effected during such possession.

2. ~~Such retention shall not prejudice the enforcement of the maritime liens set out in article 4, but may be exercisable against the vessel, notwithstanding the existence of any registered mortgages, 'hypothèques' or charges.~~ The right of retention shall rank after all maritime liens set forth in article 4 and after all registered mortgages, 'hypothèques', and charges which comply with the provisions of article 1. Such a right of retention shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or shiprepairer, otherwise than in consequence of an arrest or seizure.

Article 7

18. The United States believes that a specific reference to article 4 is unnecessary in that all maritime liens have the same characteristics. Accordingly, the United States supports deleting the bracketed language that was added at the 5th meeting of the JIGE. The United States supports the following text:

Article 7: Characteristics of maritime liens

> Subject to the provisions of article 11, ~~the~~ maritime liens ~~[set out in article 4]~~ follow the vessel, notwithstanding any change of ownership or of registration or of flag.

Article 8

19. The draft convention provides only for a one-year expiration period for maritime lien claimants to enforce their claims. However, under existing commercial practice, a one-year period is unreasonable and unrealistic to enforce many maritime claims. Frequently, the arrest and claims process requires well over a year. While we appreciate the concerns expressed indicating a desire for certainty, an inadequate expiration period could substantially undermine the ability of many ships to obtain services. Consequently, the United States would propose a compromise option to extend the strict one-year time period by providing proper notice to the State of registration. Although the United States would prefer a substantially longer period of time to the one-year expiration period provided in paragraph 1, providing an option to extend the period to three years may be a suitable compromise. Accordingly, the United States proposes the following amendments to article 8:

Article 8: Extinction of maritime liens by lapse of time

> 1. The maritime liens set out in article 4 shall be extinguished after a period of one year from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale.
>
> 2. The one-year period established in paragraph 1 shall be extended to three years if the State of registration is notified of the claim within one year from the time when the claim arose.
>
> 3. The expiration ~~one year~~ period referred to in the preceding paragraphs shall not be subject to suspension or interruption, provided, however, that the time shall not run during the period that the arrest or seizure of that vessel is not permitted by law.

Article 10

20. This article describes the procedural requirements in respect of who may receive notice and how notice must be given prior to a forced sale in a State Party. It is significant to note that the notice requirements in the maritime practice of many States vary widely. The United States is concerned that certain provisions of this article do not reflect the variety of those practices and consequently could interfere with the practices of those nations and unduly hamper commercial activities. Three proposals are made to improve the draft convention.

21. First, as currently drafted, the interplay between article 10(1)(c) and article 10(2) could have an unintended and undesirable effect. For example, a holder of a registered mortgage, hypothèque or charge issued to bearer or a holder of a maritime lien could continue to trigger additional 30-day notice periods even though these article 10(1)(c) holders might already have had reasonable notice of the sale. In this situation, holders under article 10(1)(b) would have been provided 30 days notice pursuant to article 10(2). However, an article 10(1)(c) holder may later appear and require the triggering of an additional 30-day period even where the article 10(1)(c) holder had notice other than that provided under article 10(2). The consequence in this circumstance is to delay the sale for an additional 30-day period. And, as currently drafted, article 10 would allow such a situation to possibly reoccur again and again, resulting in considerable delay and inefficiency.

22. The United States believes that a better alternative would be for the draft convention to structure article 10(1)(c) consistent with article 10(2)(b) to promote greater equity and avoid the unintended and undesirable result of unnecessary delay causing excessive costs in forced ship sales. This solution would protect the interests of all holders while at the same time resulting in efficient forced sales with a minimum of waste and delay.

23. Additionally, in article 10(1)(c), holders of registered maritime liens should be provided adequate notice rather than merely providing notice to only those holding article 4 maritime liens. The provision of such notice would not be a significant burden upon the competent authority but would be of substantial importance in the worldwide enforcement of maritime liens without jeopardizing the security interests of the mortgagee, particularly since article 6 maritime liens rank behind the mortgage.

24. Finally, the United States believes that the shipowner should also be provided notice of a forced sale. While it may be assumed that the shipowner would be notified by his agents, we believe this requirement should be explicit in order to protect the shipowner's interests, providing such notice would not be a significant burden upon the competent authority.

25. The United States fully supports the deletion of the brackets around paragraphs 2(b) and 4 in the draft text. In addition, we also would propose the following amendments to paragraphs 1 and 2 to solve the problems discussed above:

Article 10: Notice of forced sale

1. Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to:

(a) the authority in charge of the register in the State of registration;

(b) all holders of registered mortgages, 'hypothèques' or charges which have not been issued to bearer; ~~and~~

(c) all holders of registered mortgages, 'hypothèques' or charges issued to bearer and all holders of the maritime liens ~~set out in article 4~~, provided that the competent authority conducting the forced sale receives notice of their respective claims and the holder has not otherwise received reasonable notice that the State conducting the proceedings has determined is sufficient to protect the interests of the holder; and

(d) the shipowner.

2. Such notice shall be provided at least 30 days prior to the forced sale and shall contain:

(a) the time and place of the forced sale; or

(b) such particulars concerning the forced sale or the proceedings leading to the forced sale as the State conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

Article 11

26. In the view of the United States, this important article of the draft convention is generally consistent with commercial practice and, as such, we support the present text. While noting that new paragraph 3 may be added, on the basis of decisions that the Conference may take in respect of article 6 bis, the United States would also suggest two minor changes. The first amendment is merely the insertion of a comma that we believe was inadvertently omitted during work to revise the 1967 draft convention. The second amendment is merely the insertion of some clarifying language in existing paragraph 3 to clarify the State Party's obligations. Accordingly, the United States proposes the following minor amendments:

Article 11: Effects of forced sale

1. In the event of the forced sale of the vessel in a State Party, all mortgages, 'hypothèques' or charges, except those assumed by the purchases with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided however that:

(a) at the time of the sale, the vessel is in the area of the jurisdiction of each State, and

(b) the sale has been effected in accordance with the law of the said State and the provisions of article 10 and this article of this Convention.

2. [No change is proposed.]

3. If at the time of the forced sale the vessel is in the possession of a shipbuilder or of a shiprepairer who under the law of the State Party in which the sale takes place enjoys a right of retention, such shipbuilder or shiprepairer must surrrender possession of the vessel to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claim of holders of maritime liens mentioned in article 4.[6/]

4. When a vessel registered in a State Party has been the object of a forced sale in a State Party, the competent authority in the State Party where the sale occurred shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all mortgages, 'hypothèques' or charges, except those assumed by the purchaser, and of all liens and other encumbrances, provided that the requirements set out in paragraphs 1(a) and (b) have been complied with. Upon production of such certificate, the ~~registrar~~ competent authority in the State Party shall be bound to delete all registered mortgages, 'hypothèques' or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of reregistration, as the case may be.

5. [No change is proposed.]

Article 15

27. This article did not previously exist in the 1967 Convention but is now necessary owing to the increasing commercial practice of bareboat chartering allowing a vessel to fly temporarily the flag of another State Party. Only a consequential change to article 15(d) is proposed to make this provision consistent with article 3 by replacing the word "satisfied" with "discharged". The United States does not propose any substantive changes to article 15 and would like to indicate its full support for the current language which does not condition mortgage validity on the fulfilment of an administrative requirement.

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6/ This addition reflects the change as proposed by the JIGE. See JIGE(VI)/8, annex, at 5 note 1.